Brief of Wilson for Appellant.

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JAMES H. McKENNEY,
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Supreme Court of the United States.

October Term, 1896.

LEWIS C. KARRICK, Appellant,

vs.

CHARLES L. HANNAMAN, Appellee.

Nos. 72 and 73.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR APPELLANT,

By JEREMIAH M. WILSON.

J. G. SUTHERLAND,
A. HOWAT, and
C. W. BENNETT,
Of Counsel.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

LEWIS C. KARRICK, Appellant,
vs.
CHARLES L. HANNAMAN.
Nos. 72 and 73.

Appeal from the Supreme Court of the Territory of Utah.

Statement.

This is an action for the dissolution of a partnership and for an accounting.

The bill of complaint filed in the District Court for the Third Judicial District of the Territory of Utah by Charles L. Hannaman against Lewis C. Karrick and The Bast-Marshall Mercantile Company, alleges:

That the Bast-Marshall Mercantile Company is a corporation organized under the laws of Utah; that on February 3, 1886, plaintiff entered into a partnership with the defendant Karrick, under an agreement attached thereto and marked A; that, upon the making of said agreement, plaintiff and defendant Karrick commenced and carried on a mercantile and laundry business, plaintiff in all respects performing his part of the agreement until on or about February 1, 1888.

That on the last named date the defendant Karrick took *exclusive possession of the partnership books, stock, and premises, and has ever since prevented plaintiff from having access thereto, or in any manner participating in said business and in the benefits of the same;* that plaintiff has at all times been ready and willing to perform his part of said agreement, etc., and that, during the time aforesaid, the defendant Karrick wrongfully, and in fraud of the rights of plaintiff, operated and controlled said business for his own exclusive use and benefit, and converted and applied to his own exclusive use and benefit, from the receipts and profits thereof, a large sum of money, greatly exceeding the proportion thereof to which he was entitled.

That on or about the 1st day of January, 1890, the defendant Karrick, without the knowledge or assent of plaintiff, undertook to sell to the Bast-Marshall Company all the assets, stock in trade, good will, and property of every description owned and held by said partnership; and that the said Bast-Marshall Company, on or about said date, entered into and took possession of said property, and, in collusion with the defendant Karrick, wrongfully withholds said property from plaintiff; that the said company took said property with full notice of the rights of plaintiff; that the said assets, stock in trade, and good will of said business are of great value, the net profits of said business accruing during the past two years being not less than $15,000 per year.

Plaintiff prays that the partnership be dissolved; that a receiver be appointed to take charge of said property; that the defendants be restrained by injunction from interfering; that the property be applied to the payment of the partnership debts, the remainder to be divided among the parties according to their respective rights; that the transfer to the Bast-Marshall Company be set aside and cancelled; that defendants be required to account, and for general relief.

The separate answer of the defendant Karrick (*R., p. 7*), admits that plaintiff and said defendant entered into a partnership as alleged, and that they carried on said business until February 1, 1888, but expressly denies that plaintiff, in all respects, performed his part of said agreement, and alleges that the plaintiff failed and neglected so to perform his part, and conducted said business to the verge of bankruptcy; defendant admits that on said last-named date he *took possession of said premises and business*, but denies that he prevented plaintiff from having access to the books and from participating in any manner in said business, and alleges that when he so took possession the said firm was insolvent and heavily in debt; that plaintiff owed said firm a large sum of money which could not be collected because of plaintiff's insolvency; that plaintiff also owed this defendant a large sum of money, and that the partnership theretofore existing between the parties was then and there dissolved.

The said answer then denies substantially all the other allegations of the complaint; and for further answer, *and by way of cross complaint*, says that owing to the importunities and representations of plaintiff, as to possible profits, etc., he entered into said contract of partnership, and paid the plaintiff $5,000 for one-half interest in the said Troy Steam Laundry, machinery, and plant, and placed to plaintiff's credit at the bank $15,000 for the purchase of the mercantile business of W. H. Yearian; that defendant had never had any experience in the laundry business, but relied entirely upon the truthfulness of the representations of plaintiff; that defendant also loaned plaintiff $5,000, and took, as security therefor, a chattle mortgage upon plaintiff's half in the laundry machinery.

Defendant further shows that it was afterwards ascertained that the said Yearian mercantile stock could not be purchased for $15,000, as represented by plaintiff, but

that the purchase price amounted to $17,250, of which amount plaintiff agreed to pay $2,250, and did actually pay $250, giving notes for the balance of $2,000; that when these notes came due plaintiff failed and neglected to pay the same, and defendant was compelled to take up and pay them in order to protect the credit of the firm, and that plaintiff has failed to this day to pay said notes; defendant says that at that time, of entering into said agreement, he was superintendent of a group of mines, and, his time and attention being fully occupied, he was unable to devote himself to the concerns of Hannaman & Co., and accordingly left the entire charge and control of matters to the plaintiff; that immediately after the said contract was signed, plaintiff absented himself for six weeks, saying that he was going East, to purchase machinery for a dye works, which they contemplated running, having agreed to be gone only two weeks, and that defendant was, therefore, obliged, at great financial loss and inconvenience to himself, to take active control of the business until plaintiff returned.

Defendant further shows that, upon his return, plaintiff entered upon the charge of said business and conducted the same without rendering any statement to defendant or giving him any information until January 2, 1887, when defendant insisted upon, and after much delay, received a statement showing that the business was being run at a profit. Defendant found, however, upon an investigation of affairs, that the stock had not been increased; that there was a large overdraft at the bank, and that the business was losing money. Defendant also found that upon said trip East, plaintiff had expended for sundry items $3,049.10, and that he had used the money of the firm to the amount of $3,848.62, leaving unaccounted for the sum of $797.52; and defendant says that notwithstanding the provision of said agreement

that no money should be drawn out of the business until January 1, 1887, plaintiff drew from said business sums aggregating $2,227.57 prior to said date.

Defendant further shows that the plaintiff grossly mismanaged said business, so that on the 1st of January, 1888, there was an overdraft at the bank against the firm of $6,972.52, the firm also owing $6,000 additional; that the laundry business was running at very small profit, and the store and dye works at a loss; that the stock was badly damaged, neglected, and incomplete; that the laundry was in a condition to be closed down; that the cess pools had been neglected and had become a public nuisance, and that the machinery was in very bad shape. Defendant says that this being the condition of affairs, he had a consultation with plaintiff, informing him that the firm was constantly losing money; that the management of plaintiff was bad and incompetent; and that he desired to wind up the affairs of said company; that he would give plaintiff an opportunity to buy him out, or that he could retire, leaving defendant to assume the indebtedness.

That plaintiff agreed to this proposition, and asked defendant for 60 days time to raise the money to buy him out, at the end of which time, plaintiff having informed defendant that he could not raise the money, defendant thereupon took possession, and from that time carried on the business in the name of L. C. Karrick, for his own exclusive use and benefit, in the same place in which Hannaman & Co. did business, until the month of December, 1889, when he sold and transferred the same to Messrs. A. G. Bast, James A. Brown, E. D. Woodruff, James Marshall, and L. L. Terry; that he was paid therefor, at the time of said purchase, $5,000, and afterwards the balance of $24,791.87; that the said purchasers took exclusive possession, and in January, 1890, transferred said property and business to the Bast-Marshall

Mercantile Company, a corporation, and received payment in full for the same.

Defendant further says that at the time of said purchase the said purchasers had no knowledge of any partnership between plaintiff and this defendant, or of the claim of plaintiff as alleged, and defendant alleges, upon information and belief, that plaintiff had knowledge of said negotiations, but did not make known to said purchasers any claim or that he was a partner in said business; and defendant avers that, by reason of delay in bringing this action, etc., he is estopped from asserting any right or title to said property; that the firm of Hannaman & Co. was completely dissolved on or about the 1st of February, 1888; that defendant paid the aforesaid firm debt, and ran the business in his own exclusive name and for his own benefit without objection from the plaintiff until the same was sold as aforesaid; that said sale and negotiations therefor were made in good faith.

Wherefore defendant prays judgment for $7,000 with interest; that plaintiff be required to pay costs, and for other relief.

Upon motion and consent of the attorneys for the respective parties, the case was referred to Samuel A. Merritt, as sole referee, to hear, try and determine the issues, etc. The action as to the defendant, the Bast-Marshall Mercantile Company, was, as aforesaid, dismissed. After hearing the evidence in the case, the said Referee found the facts set forth in the Record. (*R., pp. 22–24*):

Thereafter the said District Court for the Third Judicial District of Utah adopted the report of the Referee (*R., p. 26*), and decreed that the said findings of fact and conclusions of law "are hereby adopted and made the findings of fact and conclusions of law and decree of this court." Defendant then moved for a new trial, which was overruled (*R., pp. 27, et seq.*), and an appeal was thereupon taken and prosecuted to the Supreme

Court of the Territory, the opinion of which latter court, sustaining the judgment of the court below, will be found on page 117 of the Record. The decree of the court below was modified, however, by the Appellate Court, which allowed the defendant $3,000 for personal expenses, being at the rate of $125 per month, as per the said agreement, which he would have been allowed to draw during the two years in which he conducted the business of the firm, thus reducing the amount of the judgment to $9,040.53.

Afterwards, on the 28th of October, 1893, the said Supreme Court of the Territory of Utah, upon petition for rehearing filed by respondent, and after the allowance and perfection of an appeal to this court, again modified said decree by reducing the amount of its former judgment $1,500, instead of $3,000 (*R., p. 127*).

Assignment of Errors.

1. The court erred in holding that the partnership between said parties was not dissolved on the 1st of February, 1888, by reason of the facts stated and found in the third finding, and in giving the said Charles L. Hannaman one-half of the profits of the business done by the said appellant subsequent to said date.

2. The court erred in holding that the evidence adduced before the Referee was sufficient to justify the said third and the sixteenth findings of fact.

3. The court erred in affirming the decision of the court below in sustaining the objection of the appellant to the admission in evidence of the letter dated January 10, 1890, marked Exhibit C, set forth in the second assignment on page 128 of the Record.

4. The court erred in affirming the decision of the court below in sustaining the objection of the appellee, Hannaman, to the following question propounded by appellant: "And that amount was contrary to your agreement, was it not?"

5. The court erred in affirming the decision of the court below in sustaining the objection of the appellee to the admission in evidence of the note represented by Exhibit H, set forth on page 128 of the Record.

6. The court erred in affirming the decision of the court below in sustaining the objection of the appellee, Hannaman, to the following question propounded by appellant in these words: "For what purpose did you devote the money which you realized on the Robert Taucy note? Did it go into the business?"

7. The court erred in affirming the decision of the court below in admitting in evidence, over the objection of appellant, Karrick, the deed from Louis C. Karrick and Sarah Karrick to W. H. Spofford, represented by Exhibit A.

8. The court erred in affirming the decision of the court below in sustaining the objection of appellee to the following question propounded by appellant to the witness Wallace:

"The proposition which I desire you to figure out for the court is this: Taking the stock in trade as contributed to the business at its valuation, fixing the amount contributed by Karrick and the amount contributed by Hannaman, then take into consideration the business as transacted by the firm from the start up to the close, as testified by you in this case; devote one-half of the net profits to the repayment of Karrick on his $15,000, so far as it goes; the other net profits went into the busi-

ness and constituted a part of the business, except that Hannaman and Karrick each, after January 1, 1887, could draw $125 per month; take into your calculation the amount of net profits which they drew, $1,500 apiece, and after you have made a summary, charging Karrick with the management and control of the whole thing, give the firm credit for what he has taken out, also for what Hannaman has taken out, then divide the firm profits, four-fifths to Karrick and one-fifth to Hannaman, and give us the result, please, as stated in this contract and explained by me."

9. The court erred in affirming the decision of the court below in admitting in evidence, over the objection of appellant Karrick, the paper purporting to be a statement of the profits of the Bast-Terry Mercantile Company for the year 1890.

10. The court erred in affirming the decision of the court below in sustaining the objection of the appellee to the following question propounded by appellant Karrick to the witness Wallace:

"Then, Mr. Karrick's credit being $2,100.40 and Mr. Hannaman's $10,923.43, will you be kind enough to state to the court how much Karrick would be owing Hannaman upon an accounting?"

11. The court erred in affirming the decision of the court below in striking out that part of the testimony of appellant Karrick to the effect that whilst appellee Hannaman was absent there was a draft on Hannaman & Co. for money, to meet which the company had no funds, and that thereupon the appellant Karrick guaranteed individually the payment of said draft.

12. The court below erred in rendering judgment herein after said court had lost jurisdiction of the case by the perfection of the appeal to this court.

BRIEF.

Recapitulation.

The foregoing statement (possibly unnecessarily extended), for the purpose of distinctly presenting the principal question now before the court, may be reduced to a few essential facts, which we enumerate as follows:

1. The parties to this action, L. C. Karrick and C. L. Hannaman, entered into a written partnership agreement on the 3d of February, 1886 (*R., p. 3*), to continue for five years.

2. The plaintiff below (the appellee here) had invested in the capital stock of the said firm stock of the value of $5,000, an amount equal to which, however, he had borrowed from the defendant below (the appellant in this court), this loan being secured by a mortgage upon the interest of the appellee in the partnership property. The appellant had invested in this capital stock $20,000.

3. The firm business, in 1886, resulted in an apparent profit of $7,848.26, but this included $2,000 of fixtures which had been received by the firm as a bonus. The remaining profit of $5,848.26 was arrived at by taking the goods on hand on January 1, 1887, at the full invoice price, and all accounts due at their face value. Neither stock nor accounts were taken at their *actual* value. (*R., p. 49.*)

4. In 1887 there was a loss, as a result of the business of that year, of $3,413.35 (*R., p. 49*). The account of the firm had been overdrawn $6,000 or $7,000, the appellee having had entire charge during that year.

5. Dissensions arose; appellant charged the appellee with mismanagement; they quarreled, and, thereupon, on or about the 1st of February, 1888, the appellant, to use the language of the complaint, "took exclusive possession of the partnership books, stock and premises," and ever after prevented the appellee from participating in any manner in the business.

6. The appellant, having thus taken possession, afterwards carried on the business in his own name. He added new machinery at a large cost, made needed repairs, etc., and so continued until January 1, 1890, when he sold out the entire business to the Bast-Marshall Mercantile Company.

7. In the years 1888 and 1889, under the management of the appellant, the business yielded a profit, and the real question in this case is whether the appellee is entitled to have an accounting as to this business and its assets after the appellant took exclusive possession, or whether, having been thus excluded, his action should have been for damages for breach of contract.

8. On the 15th of February, 1888, the appellee sent the letter which is set forth on page 32 of the Record, giving appellant notice that he was ready and willing to perform his part of the agreement, but, aside from this, during the two years intervening between the time of his exclusion and the time of the sale, took no action whatever for the enforcement of his alleged rights, but stood by and allowed the appellant to carry on the business in his own name, appropriate the profits to himself, and finally to sell the same, as above.

9. The appellant continued in the exclusive possession, as above stated, and, on the 16th of May, 1888,

wrote the letter set forth on page 73 of the Record. This letter is as follows:

"C. L. HANNAMAN, Esq.

"DEAR SIR: The firm of Hannaman & Co. is dissolved. The business hereafter will be carried on by the undersigned.

"Very respectfully,

"L. C. KARRICK."

On the same day the appellant inserted in the *Salt Lake Daily Tribune* the following notice (*R., p. 66*):

"NOTICE. All accounts due the late firm of Hannaman & Co. in the store, No. 142 Main Street, the Troy Steam Laundry and the dye works, must be paid to the undersigned.

(*Signed*) "L. C. KARRICK."

10. The Referee took into account and allowed the appellee his alleged share of the profits that accrued after the 1st of February, 1888. Our contention is that the partnership was dissolved on the last-named day, and, therefore, that—

I.

The court below erred in holding that the partnership in question in this case was not dissolved on February 1, 1888, by reason of the facts stated and found in the third finding of the Referee, and in adjudging the appellee herein to be entitled to one-half of the profits of the business done by appellant subsequent to said date.

It will be seen from the foregoing statement, that the Referee, to whom the case was referred under the stipulation of counsel and order of the court (*R., p. 22*), found as a fact that the plaintiff and defendant below, on the

3d of February, 1886, entered into a partnership agreement, as stated in the complaint, and that, upon the execution of said agreement, the parties thereto commenced to carry on the mercantile and laundry business which is the subject of controversy in this case (*Findings 1 and 2, R., p. 22*). The Referee then found the facts stated in the third finding, as follows:

"3. That, about February 1, 1888, defendant Karrick took forcible, wrongful, and exclusive possession of all of said business, stock, partnership books and accounts, and the premises on which the same were situate, and on said last-named date the defendant Karrick forcibly and wrongfully ejected the plaintiff therefrom, and ever afterward prevented the plaintiff from participating and assisting in said business and performing his part of said agreement, and in participating in any way in the profits of said business."

From these findings of the Referee it also appears that, upon the said alleged wrongful and forcible expulsion and prevention of the plaintiff from further participation in said business, or in the profits thereof, the defendant Karrick took and held the sole and exclusive possession of the property and business of said firm from February 1, 1888, the date of said expulsion, until the 1st of January, 1890, when he sold the same to his co-defendant, the Bast-Marshall Company (as to which company, as we have already said, the suit was afterwards dismissed), taking and appropriating all the proceeds of said sale to himself; and it was for his alleged share of the profits arising from the conduct of said business, from the time of such expulsion to the time of said sale, that the appellee in this case brought the present suit.

It will be remembered that the partnership agreement (*R., p. 3*) under which the said parties entered upon and carried on their said business, until the same was terminated as above, provided that the term thereof should be five years; that the capital stock of said firm should

be $25,000; that of said capital stock plaintiff should furnish only $5,000, while the said Karrick was to furnish, and did furnish, $20,000, in addition to which he loaned plaintiff an amount equal to his said contribution, to wit, $5,000; that the said last-named $5,000 was secured by a mortgage on the interest of the said plaintiff in said firm property; that the plaintiff was to give his entire time and attention to the said firm business, while defendant was only to devote such time thereto as he might see fit; that each of said parties was to be allowed to draw not to exceed $125 per month for personal expenses, and that one half of the net profits of the business was to go to the defendant in repayment of the capital stock contributed by him, and the other half was to be allowed to remain in the business.

So that, it is apparent that, at the commencement of the said partnership business, the plaintiff, Hannaman, had contributed property of the value of only $5,000 to the capital stock of said firm, and had borrowed from the defendant, Karrick, an amount equal to his interest therein, which interest was mortgaged to the defendant to secure the payment of the $5,000 so borrowed. On the other hand, the defendant, Karrick, had contributed to the capital stock of said firm $20,000, and had loaned the said plaintiff $5,000 more on his said interest, in return for which unequal condition of their respective contributions the latter was to devote his entire time and attention to the management and prosecution of said business, and was to be allowed to draw $125 a month for his personal expenses. When the firm commenced business, therefore, the plaintiff had practically not a dollar at stake, his interest in the firm property being only sufficient to discharge his debt to the defendant, Karrick, and, instead of paying off his indebtedness, it was materially increased at the time of said expulsion.

This being the condition of affairs at the time of the

commencement of said business, the defendant claims, and introduced testimony before the Referee for the purpose of showing that the plaintiff, in the conduct of said business, was guilty of gross mismanagement and neglect, and that he in many ways violated the terms and conditions of the said partnership agreement, finally involving the firm so heavily in debt that the defendant was obliged to take some action for the protection of his property. The undisputed testimony shows (and this is admitted by the plaintiff himself *R., pp. 87, 88*), that the defendant Karrick was very much dissatisfied with the plaintiff's management, and that he desired, therefore, to terminate the said partnership.

With this end in view, the defendant Karrick submitted to the plaintiff a verbal proposition for the dissolution of said firm upon the following terms, to wit: that plaintiff, provided he desired to purchase the interest of defendant in said business, should be allowed sixty days within which to raise the money for that purpose; and, upon his failure to do so, defendant was to have the entire ownership and control of said partnership property and business in consideration for his assumption and payment of the firm's indebtedness. To this plaintiff assented. Upon the expiration of the period of time limited in said verbal agreement, plaintiff not having availed himself of such opportunity to purchase the interest of defendant, and having notified defendant that he could not raise the money, defendant took possession of said partnership property and business, and thereafter conducted the same, served notice upon the public, signed checks, and advertised in his own name, and on his own account, until he finally sold out to the Bast-Marshall Company, about two years after said dissolution. (*R., p. 71.*)

The verbal agreement, above referred to, was denied by the plaintiff in his testimony (*R., p. 87*), and the Ref-

erce found as a fact that it did not exist (*Finding 16, R.*, p. *24*), and that the said partnership was not dissolved by the act of the defendant in taking possession of said property and premises as aforesaid. Counsel for appellant Karrick, in the court below, contended that the evidence in the case was insufficient to justify the third finding of the Referee (last above quoted), and that, even if the said Karrick did take such forcible and wrongful possession of the partnership property and business, nevertheless such act amounted to, and accomplished, a complete dissolution of the partnership, and that the remedy of the injured party, if any he had, was by an action upon the contract for damages. The court below, however, held the reverse of these two propositions, basing its entire decision upon such holding and ignoring the other errors assigned in the case. (*See the opinion of the court at pp, 117 to 122 of the Record.*)

That the court below erred in so holding, we think there can be no doubt. It may be that, as contended by the appellee, there are cases and authorities which hold that a partnership entered into for a fixed period of time can, before the expiration of the period so fixed be dissolved only by mutual consent, by decree of a court of equity, or by the marriage, death or assignment of one of the members of the firm, but the weight of authority, so far as we have been able to find, seems to be in favor of the proposition that a partner can, at any time, if he believes his interest to be endangered by the manner in which the business is being conducted, or if his relations with his associates have become so unpleasant as to be productive of discord and strife, in good faith and without any fraudulent or evil motive, terminate the partnership by his own act, leaving the other member or members of the firm to his or their action for damages upon the contract for any injury he or they may have received thereby.

This principle is asserted in the 17th volume of the American and English Encyclopædia of Law, as follows (pp. 1097–8):

"While many courts and judges have denied and doubted the power of a partner to withdraw from, or voluntarily do any act which will effect the dissolution of, a partnership for a fixed term, *the prevalent doctrine would seem to be that there is no such thing as an indissoluble partnership*, and that the power given by one partner to another to make joint contracts in behalf of both is not only revocable, but one which he can not divest himself of the capacity to revoke. But however that question may be regarded, it is in either event clear that the delinquent partner is responsible in damages for his breach of covenant in so doing."

To this is cited:

Skinner v. *Dayton*, 19 Johnson (N. Y.), 513;
Solomon v. *Kirkwood*, 55 Mich., 256;
Slemmer's Appeal, 58 Pa. St., 155;
Mason v. *Connell*, 1 Wharton (Pa.), 381;
Blake v. *Dorgan*, 1 Green (Iowa), 537;
Cape Sable Company's Case, 3 Bland (Md.), 606;
Marquand v. *N. Y. Mfg. Co.*, 17 Johnson (N. Y.), 525;
Monroe v. *Hamilton*, 60 Ala., 226;
Miller v. *Bingham*, 50 Cal., 615;
Bank v. *New Orleans, &c., Co.*, 11 Wall, 624;

In section 577 of Bates on the Law of Partnership (p. 605), the author says:

"Whether, in a partnership for a fixed term, a member has the right to dissolve at will before the expiration, presents an interesting question upon which courts are divided. On the one hand is the partnership agreement, a contract to form a firm for a stated number of years, together with the fact that courts of equity entertain bills for dissolution of such partnerships for cause, and grant or refuse them according to the merits. At least

four-fifths of the cases I have cited in this chapter, of dissolutions for misconduct and dissensions, were partnerships for a fixed period unexpired. *On the other hand is the unwisdom, not to say impossibility, of compelling an unwilling and dissatisfied partner to remain in a connection at the nearly certain risk of discord, litigation and consequent loss.*"

The author then cites, in support of the latter view, several of the cases above cited from the Encyclopædia of Law.

In section 773 of Story on Partnership is the following:

"It was held (in the Roman law) that it was competent for any partner to renounce the partnership, whether it was a partnership at will or for a fixed period of time, even although he had expressly stipulated to the contrary, provided he acted in good faith and without any sinister motive. * * * *It was sufficient if the partner renounced for a reasonable cause*, and at a reasonable time."

The leading case in the United States upon this subject is that of *Skinner* v. *Dayton* (19 Johnson's N. Y. Rep., 513, 538), in which Justice Platt elaborately considers the question, and states his conclusion as follows:

"There can be no such thing as an indissoluble partnership. *Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect, and, after such publication, the other members of the firm have no authority to bind him by any contract. Even where partners covenant with each other that the partnership shall continue for seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose*, the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the power to revoke it."

The facts in the case of *Solomon et al.* v. *Kirkwood and Hollander* (55 Mich., 256) are substantially similar to those in the case at bar. The plaintiffs were jewelers doing business in Chicago, and sought to charge the defendants, as partners, upon a certain promissory note. The defendants Kirkwood and Hollander had entered into a written agreement of partnership for one year from July 6, 1882. Business was begun under this agreement and continued until the latter part of October of the same year, *when Kirkwood, becoming dissatisfied, locked up the goods and excluded Hollander altogether from the business.* He also notified all persons with whom the firm was dealing that the partnership was dissolved. Hollander subsequently went to Chicago and bought goods from plaintiffs on the firm account, giving therefor the note involved in the suit, to which he had signed the firm name. The court, by Cooley, J., says:

"We think the judge committed no error in his instructions respecting the dissolution of the partnership. The rule on this subject is thus stated in an early New York case." (The court then quotes from the case of *Skinner* v. *Dayton*, what we have already quoted above, and continues): 'To the same effect are *Mason* v. *Connell*, 1 Wharton, 381, and *Slemmer's Appeal*, 58 Penna. St., 155. *When one partner becomes dissatisfied, there is certainly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve.* Most contracts may be broken at pleasure, subject, however, to responsibility in damages, and that responsibility would exist in breaking a contract of partnership, as in other cases.'"

In the said case of *Mason* v. *Connell* (1 Wharton, 381), the court held what is thus expressed in the syllabus:

"It seems that a partnership formed by articles for a definite period *may be dissolved by either partner before the termination of the period.*"

In the case of *Blake* v. *Dorgan* (1 Green's Iowa Rep., 540), the case of *Skinner* v. *Dayton* (*supra*) is again cited with approval, the court saying of the opinion of Justice Platt in that case:

"And the reasoning of Justice Platt is favorably commented on by Chancellor Kent in his Commentaries, Vol. 3, 55, and such is the French law; *and such we believe to be the more reasonable doctrine*, leaving the injured party to his remedy on the articles of covenant."

The same principle is again asserted in the case of the *Cape Sable Company* (3 Bland's Md. Chy. Rep., 606, 674), as follows:

"It is true in general that where a partnership is formed for a definite period of time, it can only be dissolved by the consent of the parties, or by the efflluxion of the specified period of time. Collyer on Partnership, 57. *But, if one of the contracting parties refuses to continue the partnership, or does any act which renders its further continuance impracticable, it must be then terminated, and the only remedy of him who wished its continuance is upon the contract for a compensation in damages for the injury he has thereby sustained.*"

In the opinion of the court below, it is admitted that there are authorities which affirm the proposition for which we now contend (*R., p. 119*), to wit, that appellant could and did effect a dissolution of the partnership in the way complained of, but the court seeks to escape from the effect of those authorities by holding that they do not apply to the case at bar, because, even admitting that they do correctly state the law, it must still be shown that there was sufficient cause for the dissolution of the partnership in the summary way which they hold to be authorized, and cites a number of authorities holding, in effect, that a party who is the author of the ill feeling or cause for dissolution ought not to be permitted to

make the relation he has himself induced the ground of the dissolution. The court states its reasons for refusing to interfere, as follows (*R., p. 119, 120*):

"Where the partnership is merely at will, the right of one partner to terminate it must be conceded: but where, by agreement, it is to continue for a time stipulated, the party seeking a dissolution before the expiration of the time ought in justice at least to be required to act in good faith and at a reasonable time and in a reasonable manner. In the case of a partnership for a stipulated time of duration, where the business has been established, is becoming profitable, and has good future prospects, to allow one of the partners *sua sponte* to expel the other and dissolve the partnership, with a view to appropriating the business to himself, would be to adopt a doctrine at once inequitable and unsupported by either reason or justice. There seems to be no good reason why a person should be allowed to commit a breach of his contract in such case, while in all other cases of flagrant violation, not within the partnership, he would be compelled to specifically perform, if it was within his power to do so."

While some of the cases we have above cited—notably that of *Solomon* v. *Kirkwood* (55 Mich., 256)—take the broad and unrestricted view that a partner may do the acts complained of in this case, and thereby effect a dissolution of the partnership, even without cause, still, we do not think that it is necessary for the appellant in the case at bar to rely entirely upon the integrity and soundness of such decisions for a reversal of the judgment below, as, in our opinion, the Record herein conclusively shows that all the elements necessary to bring the case within the most conservative of the authorities cited by the Supreme Court of the Territory exist in the case at bar.

In other words, the decision of the court below is based upon the hypothesis that the case of the appellant is utterly without merit—that, without reason or justifica-

tion of any kind, he assumed control and possession of the partnership property and business, and forcibly and wrongfully expelled the appellee therefrom, as found by the Referee; and this, of course, is the logical result of the court's refusal to set aside the Referee's finding to that effect. But we contend that the Record in this case presents sufficient grounds, and makes it the duty of the court, not only to reverse the decision of the court below upon the facts as found, but to set aside the findings of the Referee as a whole, as being manifestly unsupported by the evidence and facts as disclosed by the Record.

We therefore submit that, even in the absence of such a verbal agreement as that set up by the appellant in the present case (the terms of which are hereinbefore set forth), the said appellant, for the protection of his interests, and in good faith, could lawfully dissolve the partnership in question by the mere seizure of the firm property and the exclusion of his associate from further participation in the partnership business, and that the said partnership was so dissolved on the 1st of February, 1888.

And we think that it conclusively results from the following considerations that such a verbal agreement *was* made between said parties, by the terms of which, in the event of the failure of the appellee, within sixty days, to buy out the interest of the appellant, the appellant was to have the right to take exclusive possession of the partnership property and business, in consideration of his individually assuming all the outstanding indebtedness of the firm, and releasing the appellee from liability therefor—that it was under this agreement, and upon the failure of the appellee to exercise his said option, that the appellant took possession.

This brings us to a consideration of the question just stated.

II.

The court below erred in holding that the evidence adduced before the Referee was sufficient to justify the third and sixteenth findings of fact.

In inviting the attention of the court to the evidence and circumstances connected with this case, we desire to say that we are fully aware of the many decisions of this and other appellate courts regarding the presumptive accuracy and conclusive effect of the findings of fact of a Referee or other person appointed for the purpose of hearing testimony and reporting to the court thereupon, and as to the impossibility of reviewing such findings, "*unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence*" (*Furber* v. *Ferris*, 145 U. S., 134); but we submit that the case at bar is one that comes within the exception just quoted.

The rule upon this subject is thus laid down in the case of *Paddock & Field* v. *Commercial Insurance Company* (104 Mass., 531), in which the opinion is by Mr. Justice Gray:

"Whenever, in the absence of special provisions of statute or of the rule of reference, a case at common law, or in equity or admiralty, is referred to a subordinate officer for the purpose of finding facts and reporting them to the court, whether he is styled assessor, auditor, master in chancery, or commissioner, *his findings may be reviewed by the court*; and the appropriate way of bringing them before the court for this purpose is by specific exceptions to his findings, and by his report of the evidence upon the points on which exceptions are taken; but his findings have the weight of a verdict, and, especially when they depend upon a conflict of the testimony, are not to be set aside unless they clearly appear to be erroneous."

This rule is recognized and approved by this court in the case just above cited of *Furber* v. *Ferris* (145 U. S., 134); also in the case of *Tilghman* v. *Proctor* (125 U. S., 149, 150), and *Kimberly* v. *Arms* (129 U. S., 525), and many others.

We therefore now proceed to a consideration and analysis of the evidence for the purpose of showing that the defendant below did not wrongfully and forcibly expel plaintiff and prevent his further participation in said business, but that he took possession thereof under the agreement hereinbefore mentioned.

At the trial of the case before the Referee, the defendant, Karrick, testified that an agreement was made between the plaintiff and himself for the transfer of Hannaman's interest to him and the dissolution of the partnership, in the event that Hannaman could not obtain the money necessary to purchase the interest of defendant (*R., p. 71*). This the plaintiff denied (*R., p. 88*), but admitted that he had made a proposition to Karrick with a view to the purchase of his interest. To determine whether such an agreement was made, it is not sufficient alone to consider the assertion of one and the denial of the other. In a matter of this kind, the attending and subsequent facts and circumstances are necessarily of great weight, and we, therefore, think it proper to consider the direct testimony as to whether there was such a verbal agreement as to dissolution, in the light of the partnership agreement, the relations of the respective parties to the firm and to each other at the time of the making of such verbal agreement, the condition of the business at that time, and the subsequent conduct of the parties in the premises.

As we have already shown, by the terms of the partnership agreement, the defendant Karrick loaned the plaintiff Hannaman $5,000, secured by a mortgage upon his interest in the firm property. At the commencement

of the partnership business the plaintiff Hannaman contributed only $5,000 to the capital stock, and borrowed of defendant $5,000, an amount equal to his interest in the firm property, as just stated. Karrick contributed $20,000 besides the $5,000 loaned to Hannaman, and so when the firm commenced business Hannaman in reality had not a dollar in the firm property. Of course Karrick was interested in maintaining the firm property and credit so that it would not only repay him the $20,000 he had so contributed to the capital stock, but also be a good and sufficient security for the money he had loaned to Hannaman. Practically he had contributed all of the capital stock and Hannaman had contributed nothing.

By the terms of the said partnership agreement (*R., p. 3*) no money was to be drawn from the business by either partner until after January 1, 1887; yet in violation of this stipulation the plaintiff, Hannaman, spent about $800 of the firm's money for private purposes on a trip that he had made to the East for the purpose of buying goods for the firm immediately after the partnership was formed, drawing out of the money of said sum, from April 1, 1886, to January 1, 1887, the aggregate sum of $1,428.05 (*R., pp. 49, 50, 62, 63, 85*). According to the testimony of the plaintiff's witness, H. A. Brown (*R., pp. 49, 50*), Hannaman drew out of the firm during the first eleven months of its existence, $1,500, after giving him credit for what he had put in during that time, so that at the expiration of that year (1886) he was $1,500 short. Hannaman testified that he was directed by defendant to draw out what money he needed during 1886 for personal expenses, which Karrick denied. It is not likely that Karrick would have given such permission to violate the terms of the agreement so soon after its execution in view of the fact that it would have reduced the value of his security. If anything of the kind had been contemplated or thought necessary, no direct provision

for its prevention would have been inserted in the agreement.

Again, Hannaman testified that he had full charge of the business in 1886 (*R., p. 32*), but the defendant testifies that he made an examination of the books of the firm and called upon the plaintiff for a statement of his expenses upon the trip east, and that Hannaman admitted that he had spent $800 for his personal expenses, but would not explain how he had used it (*R., p. 69*). Hannaman admits that when he was East he drew $3,848.62 and spent on the firm account only $3,049.10, so it is evident that during the year 1886 he drew, for his private purposes, $800 from the money of the firm, in violation of the said partnership agreement. At the close of the year 1886, the interest of Hannaman, as shown by the testimony of his own witness (*R., p. 49*), was but $3,509.69, and this was all the defendant had as security for his loan to the plaintiff of $5,000.

The undisputed testimony shows that the defendant, Karrick, was dissatisfied with plaintiff's management of the business, and that, in the fall of 1887, matters came to such a pass that they had differences and quarreled over it. The defendant, Karrick, testified that, in the fall of 1887, he examined the stock of the firm and found it in bad condition (*R., pp. 68, 69*), and that he then had a conversation with plaintiff in which he said to plaintiff that he considered his management bad, that the firm was losing money, and that, if compelled to pay its indebtedness, it would be bankrupt. Hannaman himself testified that Karrick expressed himself as being dissatisfied, that he wanted to get his money out of the business, as it was not paying, and that he said he was going to wind it up; that he said he was willing to sell if he could get out what he put in (*R., pp. 87, 88*). It is perfectly apparent from the testimony of both that the defendant was dissatisfied with Hannaman and distrustful of him.

Karrick then testifies to the verbal agreement and proposition already mentioned in this brief, to wit, that the plaintiff should have an option for sixty days upon the purchase of the defendant's interest, upon his failure to do which Karrick was to take entire possession, assume the indebtedness of the firm, and surrender to Hannaman his said $5,000 note. The defendant is corroborated as to there being such an agreement by the witnesses George O. Chaney, who heard the conversation between Hannaman and Karrick (*R., p. 77*), and by Miss Belle Green, who heard at least a portion of it (*R., p. 82*). It seems to us that, irrespective of the absurdity of the claim of the plaintiff, in view of his subsequent acquiescence in said arrangement, there is a clear preponderance of the *direct* testimony in support of the contention of the appellant that there was such an agreement or understanding between him and appellee; and, when all the surrounding and subsequent circumstances are taken into consideration, it results, beyond a shadow of doubt, in the establishment of the said agreement.

On the one hand we have the direct and positive testimony of three witnesses as to the existence of the fact contended for, and on the other the unsupported testimony of a single interested witness—the plaintiff himself. The witness Chaney testifies (*R., pp. 77, 78*):

"I am acquainted with the plaintiff and defendant in this action. I was once in their employment. I commenced in October, 1887, and continued until the business was closed up. * * * I heard the testimony of defendant Karrick with reference to a conversation which he had with plaintiff at the store, 142 South Main street, in the latter part of November, or the first of December, 1887. I heard part of that conversation. I was in the office at the time it started, and I went into the laundry. It started at the stove, and when I came back Mr. Hannaman and Karrick were in the office. I went to the cash office, which is across a small passageway from where they

were. It was probably a distance of six or seven feet. There was a door in the office where I stood, which, if I recollect rightly, was partly open. Mr. Karrick and Mr. Hannaman had quite a wordy discussion. I heard Mr. Karrick tell Hannaman that it was not run in a satisfactory manner to him, and that he wished to dissolve the partnership. Those were not the exact words, but that he wished to close the business up, and *he offered a proposition to Mr. Hannaman, and said: 'Then I will give sixty days to raise the money to buy me out, and if the money is not raised in that time I will take the business and pay all the debts.' He says, 'Is this satisfactory to you?' and Mr. Hannaman said it was.*"

Miss Belle Green, the other witness for defendant above referred to, as to this understanding, testified as follows (*R., p. 82*):

"I was employed at the store. * * * I remember a conversation had between Mr. Karrick and Mr. Hannaman last November or first of December, 1887, in the rear of the store. *I heard Mr. Hannaman say he would buy Mr. Karrick out at a certain time, and, if he did not do so, Mr. Karrick was to buy Mr. Hannaman out.* I don't remember all the conversation. *I think the time was sixty days.* This conversation took place in the rear of the store in the office. I was just across the hallway, maybe five or six feet from them, when the conversation took place. I could hear distinctly what the parties said. * * * I remember when Mr. Hannaman left the store. It was before that; I should think about sixty days, probably a little longer."

When it is considered that the business of the said firm was being run at a loss; that the defendant was dissatisfied with the plaintiff's management; that the plaintiff, in the year 1886, had withdrawn money from the firm, in violation of the partnership agreement, so that his interest which was mortgaged to secure the $5,000 loan, was reduced to $3,500, and that the business appeared to be constantly losing money, it would seem that this agreement between the parties for the dissolution of

the partnership in the manner testified to by the defendant, was not only the reasonable and natural one for them to make, but that such a course was absolutely necessary to save the large amount of money that the defendant had invested, part of which was without adequate security, as shown above, and to preserve the plaintiff's means of paying his debt. The defendant's interest in the firm, together with his said loan to Hannaman, represented all that there was in the business. The defendant held a mortgage on his partner's interest, *with authority to take and hold possession at any time he might deem himself insecure without possession* (*R., p. 96*). He was, therefore, in a position properly to insist upon a dissolution of the firm as a means to secure the payment of said loan, if for no other reason, and it was reasonable and proper that he should insist upon such a dissolution.

What was the reasonable and natural thing for the plaintiff to do under the circumstances? He was aware of the fact that his associate was dissatisfied with his management of the business, as appears from his testimony (*R., pp. 87, 88*); the business was being run at a loss; he had but $5,000 in the firm, the exact amount of which he owed Karrick, and which, under the terms of said mortgage, the defendant could take possession of at any time, and he doubtless appreciated the fact that things could not continue in the way matters were then being conducted. We think that the reasonable and most natural thing for the plaintiff to do, under these circumstances, was to accept the offer of the defendant upon the terms above mentioned, and, even if the fact of this matter were left entirely to conjecture, the probability is that such a proposition was made and accepted by the plaintiff. All doubt about this matter, however, is removed by the testimony of the witnesses above referred to.

The plaintiff says that he was excluded from possession on the 10th of February, 1888. As to what took place at the time, the testimony is conflicting, but the account of the plaintiff in his testimony is certainly exaggerated. The testimony of Leroy Decker, a witness called by plaintiff, does not sustain Hannaman's testimony and does not contradict that of the defendant in this regard (*R., p. 66*). All that this witness says is that the defendant "shoved Hannaman out into the sidewalk, in an angry way." It is not contended that the plaintiff willingly yielded possession to the defendant, but in this we see nothing inconsistent with the making of the said agreement. Having failed, during the sixty days allowed for that purpose, to find someone to buy out the defendant's interest, or to advance him the money to do so, the plaintiff naturally was reluctant to surrender his position as partner in a firm in the capital stock of which he had not the slightest pecuniary interest, but from which he was making a good living, and sharing in the management and control of an extensive establishment, by reason of which he derived such obvious business advantages.

As to the subsequent relations and procedure of these parties there is no dispute. The plaintiff never went to the store after that time. All that he did was to address a letter to the defendant, dated February 15, 1888, notifying him that he was ready and willing to continue in the performance of his part of the agreement, and stating that he would be glad to have defendant indicate his wishes in the matter (*R., p. 32*). In reply thereto, on the 16th of May, 1888, the defendant sent plaintiff a letter, stating that "the firm of Hannaman & Co. is dissolved. The business hereafter will be carried on by the undersigned." (*R., p. 73.*) Upon assuming control of the said business and property, the defendant expended large sums of money in making additions and improvements, and in paying off the indebtedness of the firm,

the overdrafts and outstanding debts being between $10,000 and $11,000. He had the letter and billheads marked with a rubber stamp: "L. C. Karrick, successor to Hannaman & Co." He drew all checks connected with the business in his individual name, and the name of the firm over the store door was changed so it read, "L. C. Karrick, successor to Hannaman & Co. (*R., p.* —). It is admitted (*R., p. 66*) that the defendant inserted in the Salt Lake *Daily Tribune* a notice reading as follows:

"NOTICE. All accounts due the late firm of Hannaman & Company in the store, No. 142 Main street, the Troy Steam Laundry and the dye works, must be paid to the undersigned.

(*Signed*) "L. C. KARRICK."

The defendant, Karrick, in short, treated the property as his own, and proclaimed to Hannaman and to the public generally, that he was the sole owner and proprietor of the said business as successor of the firm of Hannaman & Co. It is incredible, under all these circumstances, and there is absolutely no testimony in the Record (except that of the plaintiff himself) tending to show, that the defendant thrust the said plaintiff out of the store and took exclusive possession of the firm property without any color of title or claim of right. If he had done so, would not Hannaman in some way have resented it? Would he have stood tamely by and allowed his rights and property, if any he had, to be appropriated by the defendant without protest other than the communication above referred to, and without seeking redress in the courts? We do not believe that any man who had any rights or property to lose would deliberately wait for two years before taking any action whatever for their recovery and enforcement. Obviously the bill for dissolution and accounting filed by the plaintiff in this case, after more than two years had elapsed

since his expulsion, was an afterthought, and resorted to simply upon the chance of obtaining additional benefits from the defendant, to which he was in no way entitled.

If the determination of the question whether there was or was not such an agreement as we have endeavored to show existed, depended or rested entirely upon the direct testimony of the defendant, Karrick, and the witnesses Chaney and Green, on the one side, and Hannaman on the other, it might fairly be contended that the referee had based his conclusion upon his opinion as to the credibility of these witnesses (although there was not even an attempt to impeach them), which was the view taken by the court below, and because of which it hesitated to disturb the said findings of the referee; but in this case the corroborative facts and circumstances to which we have directed attention are all either admitted by the plaintiff, or established by uncontradicted testimony. This is not a question of the credibility of witnesses, but a question as to the proper deductions to be drawn from undisputed facts; and no findings of the Referee should induce this court to forego its right, and its manifest duty, to make such deductions from these admitted and unassailed facts, and the evidence in the case, as, in its own opinion, may be warranted thereby.

A fair and unprejudiced consideration of the testimony in this case, in the light of all the surrounding circumstances, must, as we think, lead the court to the conclusion that such an agreement of dissolution as that set up by the appellant in this case was made, and that, therefore, there is nothing in the Record to justify the third and sixteenth findings of the Referee.

III.

The Admission and Rejection of Evidence.

There are also a number of errors assigned in this case with regard to the admission and rejection of evidence. We will not attempt in this brief to bring them to the attention of the court by any extended argument upon their merits, but deem it sufficient merely to say that the action of the Referee in so admitting and rejecting the evidence specified in said assignment, over the objection and exception of the appellant, was so manifestly prejudicial to his case, and so utterly without justification or authority of law, that the judgment below should be reversed on this ground even if the court should decide that the other errors complained of are not sufficient to warrant such reversal. If considered necessary, the matters embraced by said assignments will be further discussed in the oral argument of this case.

Conclusion.

Under the conditions existing as to this business at the time, and the relations of the parties to each other and the firm, we submit that it was not "wrongful" in any legal sense for appellant to take exclusive possession and control of said business; and, irrespective of the question as to whether the agreement of dissolution was made, and even if there was no such agreement, the fact that the appellant took exclusive possession and control was a dissolution of the partnership, and the court below erred in not so holding.

Respectfully submitted,

J. M. Wilson.

Washington, D. C.,
October 21, 1896.